

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 April 2006

BALCA Case No.: 2005-INA-113
ETA Case No.: P2004-NY-02507179

In the Matter of:

SONIA G. AUSTRIAN,
Employer,

on behalf of

GRAZYNA GRUDZINSKA,
Alien.

Appearance: Boris J. Lewyckyj, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone¹**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").² We base our decision on the record upon which the CO denied

¹ Administrative Law Judge Linda S. Chapman did not participate in this matter.

² This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On October 9, 2001, the Employer, Sonia G. Austrian, filed an application for labor certification to enable the Alien, Grazyna Grudzinska, to fill the position of "Cook - Diet - Live-Out," which was classified by the Job Service as "Cook (Household)" (AF 27). The job duties for the position, as stated on the application, were:

Prepare soups, sauces, vegetables, deserts according to special recipes of low sodium, low saturated fat, low cholesterol diet prescribed for people with high blood pressure with additional requirement of calcium supply. Portion and garnish food. Cook, steam, broil or bake food. Set-up the table, decorate dishes, serve food. Purchase foodstuff and account for the expenses incurred. Clean the kitchen, wash the dishes.

(AF 27, Item 13). The Employer specified as job requirements two years of experience in the job offered and a high school education (AF 27, Item 14). The application was submitted under the reduction in recruitment ("RIR") process (AF 37).

On September 8, 2004, the CO issued a Notice of Findings ("NOF"), in which she approved the Employer's request for RIR processing, but proposed to deny certification on the grounds that the Employer had not documented that there is a *bona fide* job opportunity which actually exists that is open to U.S. workers under Section 656.20(c)(8), nor had the Employer established that she has sufficient funds available to pay the wage or salary offered, as provided in Section 656.20(c)(1).

The Employer submitted a rebuttal to the NOF on September 14, 2004 (AF 13-16). However, in the Final Determination dated September 30, 2004, the CO found the rebuttal unpersuasive and denied certification (AF 11-12). On October 29, 2004, the Employer requested a review of the denial (AF 1-10). Subsequently, this matter was forwarded to the Board of Alien Labor Certification Appeals ("Board"). On April 21, 2005, we issued a Notice of Docketing and

Order Requiring Statement of Position or Legal Brief. Although the Employer did not respond thereto, the grounds for the appeal are set forth in the request for review.

DISCUSSION

In the NOF, the CO cited applicable regulations, as set forth above, and stated, in pertinent part:

Your responses, documentary evidence, and all other relevant factors, will be evaluated to determine whether the position of Domestic Cook actually exists in your household. The adequacy of the documentation will be key to the evaluation of your application because little weight will be accorded to conclusory statements. Merely answering all the questions does not insure approval of the application.

(AF 18).

In the NOF, the CO set forth a series of questions requesting specific information such as, the number of meals, preparation time, number of people for whom the meals are prepared; the daily schedules for each household member; issues related to children in the household, if applicable; percentage of the Employer's disposable income devoted to pay the Alien's salary; information regarding other domestic workers employed in the household, if applicable; change in circumstances which led to current job offer; and, medical information regarding the Employer's dietary needs. Moreover, the CO directed the Employer to provide specific documentation to address the above-listed questions. For example, an "entertainment" calendar for the 12 months preceding the filing of the application, in which the Employer should list the number of guests entertained, meals served, etc.; a signed copy of the Employer's Federal Income Tax Return for the calendar year preceding the date of application; and, a note from a medical treatment source which specifies the Employer's physical restrictions, if any, and which documents the Employer's medical need for a domestic cook (AF 18-19).

The Employer's rebuttal consisted of a letter dated September 14, 2004, signed by her attorney, Boris J. Lewycky, Esquire (AF 13-15), and a letter from Dr. Sharon Hird (AF 16). In summary, Mr. Lewycky's letter provides some details regarding the cook's schedule. However, it fails to specify the Employer's daily schedule as explicitly requested in the NOF. According to the Employer's counsel, the Employer does not rely on her entertainment schedule as the basis

for her need of a domestic cook. The Employer's counsel reported that the Employer is a 71-year old, who is a private practitioner in social work therapy with an annual income, and substantial assets in real estate and liquid assets from a stock portfolio. However, the Employer failed to provide a copy of her Federal Income Tax Return as expressly requested in the NOF; nor was any other financial documentation provided.

In addition, the Employer's counsel stated that there are no children or other full-time household employees. The Employer's counsel stated that the general household chores are performed by the Employer; and that on occasion, more difficult chores are performed by the building service personnel. He stated that the cooking chores are currently performed through a combination of part-time assistance and a specialty food delivery service. Moreover, the Employer's counsel stated that "the Alien does perform cook work on a catering basis for the Employer, delivering meals as they are ordered." The Employer's counsel also provided information regarding the restrictions in the Employer's diet related to high blood pressure and high cholesterol, and stated that the Employer's age and medical condition now require her to have a full-time cook (AF 13-15). In support of the Employer's position, the rebuttal also contains Dr. Hird's letter, dated March 31, 2004, which indicates that the Employer suffers from high blood pressure and high cholesterol, and is controlled for these conditions through a combination of medications, exercise and a special diet. (AF 16).

In the Final Determination, the CO stated, in pertinent part:

In our Notice of Findings on pages 2 and 3, we asked a series of seven questions concerning the bona fide nature of the job opportunity within the employer's household as a permanent full-time **Household Cook**. Employer's rebuttal does not successfully address these questions.

According to the employer's rebuttal the household consists of the employer herself, a seventy-one year old who suffers from high blood pressure and high cholesterol. The rebuttal contains a letter from a physician, confirming that the employer has these conditions and requires a specific diet, but it does not indicate that the employer has any physical restrictions that would prevent her from preparing her own meals. The **Cook's** duties would consist of cooking meals for the employer alone and these meals would conform to employer's special dietary needs. The rebuttal does not state the employer's daily schedule, as requested, but it does indicate that the entertainment of guests is not the basis of the job duties in the instant case. The Cook would not be asked to perform any

household chores not related to the purchasing, cooking, serving, and cleaning of meals and the kitchen, as the employer or contract workers would discharge these tasks. The employer has not previously employed a Cook, but the rebuttal states that her age and medical condition now require her to do so.

The rebuttal asserts that the Cook's salary would occupy approximately 45% of the employer's disposable income, but this claim cannot be verified because the requested tax returns are not included in the rebuttal. The rebuttal states that the employer's annual income is approximately \$■■■■■ but there is no indication as to how much of this income is taxable. The rebuttal also asserts that the employer's net worth is over \$■■■■■ dollars, but it does not provide evidence in support of this assertion, nor does it provide any information as to employer's expenses.

We hold that the evidence on file is insufficient to substantiate a bona fide full-time job opening for a domestic cook exists within the employer's household.

This case for Alien Employment Certification is denied.

(AF 12) (Employer's financial information redacted). We agree.

In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc), the Board held that a CO may properly invoke the bona fide job opportunity analysis authorized by 20 C.F.R. § 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. A totality of the circumstances is applied. Factors such as the inherent implausibility of a household using a very high percentage of its disposable income to hire a cook may be considered.

It is well-settled that the employer bears the burden of proof in certification applications. 20 C.F.R. § 656.2(b); see *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). As outlined above, the CO reasonably requested relevant information in the NOF, in order to ascertain whether there is a *bona fide* full-time job opportunity for the position of "Cook" within the setting of the Employer's household. Notwithstanding the CO's explicit instructions in the NOF, the Employer's rebuttal did not include Federal tax returns to document the Employer's financial ability to pay the stated wage offer; nor did the Employer provide her daily schedule to document her need for a full-time cook.

The Board has consistently held that a petitioning employer must provide directly

relevant and reasonably obtainable documentation requested by a CO. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob's Chevron*, 1993-INA-498 (May 31, 1994). The Employer in the instant matter clearly failed to provide reasonably obtainable documentation directly relevant to the issue to be determined that was specifically requested by the CO. Accordingly, we find that labor certification was properly denied.³

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages.

³ Employer's counsel submitted the first page of Employer's 2000 Federal Income Tax returns (AF 4), together with the request for review. Not only is this documentation incomplete, but more importantly, it is untimely. It is well settled that evidence submitted after the issuance of the Final Determination cannot be considered on appeal pursuant to 20 C.F.R. §656.27(c). *See, e.g., Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Moreover, even assuming that Employer had documented that she is financially capable of paying the stated wages, certification would still be denied. As outlined above, Employer did not provide her daily schedule, as requested in the NOF, and failed to establish the need for a full-time cook.

Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.